UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHIPOTLE SERVICES, LLC, A WHOLLY OWNED SUBSIDIARY OF CHIPOTLE MEXICAN GRILL, INC.

and **Case 14–CA–128253**

MID-SOUTH ORGANIZING COMMITTEE

Bradley A. Fink, Esq. and
Christal J. Key, Esq.,
for the General Counsel.
Scott A. Gore, Esq. and
Tanya E. Milligan, Esq.,
for the Respondent.
Rochelle G. Skolnick, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in St. Louis, Missouri, on September 10-11 and October 15, 2014. Charging Party Mid-South Organizing Committee filed the charge on May 7, 2014, and a first amended charge on June 30, 2014, and the General Counsel issued the complaint on June 30, 2014.[1] The complaint alleges that Chipotle Services LLC, a wholly owned subsidiary of Chipotle Mexican Grill, Inc. (Respondent) violated Section 8(a)(1) of the Act by threatening and interrogating employees, by telling employees that managers were instructed to report any employee discussions about wages, and by telling employees that they could not talk about their wages. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Patrick Leeper. Respondent timely filed an answer denying the alleged violations in the consolidated complaint and raising several affirmative defenses. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file

[1] All dates are in 2014 unless otherwise indicated.

briefs. On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company with restaurants in the State of Missouri, is engaged in the sale of food and beverages. Respondent operates a restaurant and place of business on Delmar Boulevard, St. Louis, Missouri, which annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Missouri. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 21–23.)

In its answer, Respondent denied knowledge or information sufficient to form a belief as to the statutory labor organization status of the Mid-South Organizing Committee (Union). Section 2(5) of the Act defines a labor organization as, "…any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work." The plain language of the Act does not require that a labor organization exist for the purpose of dealing with any particular employer, rather, the Act says it may exist for the purpose of dealing with employers. Furthermore, it is the intent of the organization that is critical in determining labor organization status. *Edward A. Utlaut Memorial Hospital,* 249 NLRB 1153, 1160 (1980).

The Union's secretary-treasurer and organizing director, Adolfo Herrera-Neal, testified that the Union is an association of workers employed in the retail fast food and related industries, who have joined together to promote and protect the interests of its members by bargaining collectively with their employers to ensure better working conditions. (Tr. 138–139). Herrera-Neal further explained that the Union's aims are to unite fast food workers in an effort to improve wages and working conditions. (Tr. 144.) The Union meets with employers on behalf of employees in an effort to resolve grievances and conducts large scale demonstrations seeking higher wages for fast food workers. (Tr. 144–125.) The Union has bylaws and a provisional constitution and has registered with the Federal Government by filing forms LM-1 and LM-2 with the United States Department of Labor. (GC Exhs. 11, 12(a), 12(b), 13). In view of these facts, I conclude that the Mid-South Organizing Committee is a labor organization within the meaning of Section 2(5) of the Act.[4]

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[2] The transcripts in this case are generally accurate, but I make the following correction to the record: Tr. 259, LL. 19–20 "General Counsel's Exhibit (a)" should be "General Counsel's Exhibit 8."

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] The Union was previously known as the St. Louis Organizing Committee, but changed its name in 2014. (GC Exhs. 12A, 13; Tr. 141.)

II. Alleged Unfair Labor Practices

A. Overview of Respondent's Operations and Management Structure

Respondent operates about 1,700 quick service restaurants and employs 35,000 to 40,000 employees nationwide. (Tr. 401–402.) Tim Healy is employed by Respondent as a Restaurateur 4, meaning that he has promoted four of his employees to become general managers of other locations. (Tr. 42.) Healy oversees Respondent's Delmar (or Delmar Loop), Clayton, Creve Coeur, and O'Fallon locations. (Tr. 42–43.) Respondent has provided Healy with a black Toyota Prius and cell phone for his use. (Tr. 45, 46.) Healy's direct supervisor is Team Leader Tim Wurdack. (Tr. 43.)

The Delmar store has two or three service managers. (Tr. 44.) The service manager is responsible for overseeing everything related to the front of the house, including the training of the line personnel and cashiers. (Tr. 44, 361-362.) The service manager also oversees the kitchen manager, who is responsible for everything in the back of the house. (Tr. 44.) On the night shift, the service manager is responsible for the back of the house. (Tr. 362.) The number of supervisors on duty varies by shifts and there are more supervisors on duty during the day shift than during other shifts. (Tr. 45.)

Thomas Brownlee, Desmond Golliday, and Alicia Johnson are or have been service managers at the Delmar store. (Tr. 44, 296.) Martay Love is a kitchen manager and Mark Creggor is an apprentice general manager at the Delmar store.[5] (Tr. 230–231; 248-249.) The parties have stipulated, and I find, that Wurdack, Healy, Brownlee, Johnson, Love, and Creggor are supervisors of Respondent within the meaning of Section 2(11) of the Act, and that Golliday and Love are agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 20; 301.)

Respondent holds mandatory all-store meetings at each store about once per quarter, usually on Sunday mornings. (Tr. 404, 405.) Employees are supposed to clock in for the meetings, but payroll records and rosters of Respondent's employees reflect that not all employees do so. (GC Exh. 7(c).) At the hearing and in its brief, Respondent maintains that employees who do not attend these meetings will be terminated. (Tr. 280–281; R. Br. p. 2–3.) However, this policy is not disseminated to all of Respondent's employees, as two testified at the trial that they were not aware of the consequences for missing an all-store meeting. (Tr. 283, 299.)

Respondent maintains development journals for its employees at each store. (GC Exhs. 9, 27–31; J. Exh. 1–3.) The development journal is meant to act as a record of each employee's employment throughout their time with Respondent and documents the employee's work performance, both good and bad. (Tr. 472–473.) When a development journal is full, Healy sends it to Respondent's corporate offices. (Tr. 432.)

Respondent identifies its best employees as top performers and its worst employees as low performers. (Tr. 260, 397.) A top performer is someone with the desire and the ability to perform excellent work and whose constant effort elevates themselves, their team, and Chipotle. (Tr. 260, 402.) A low performer is characterized as someone missing desire and constant effort.

[5] Creggor was referred to as "McCreggor" by Leeper in his testimony.

(Tr. 397.) Respondent experiences significant turnover of employees at the Delmar store; about 80 percent in 2013. (Tr. 47.)

Respondent maintains a crew handbook, which it provides to all employees. (GC Exh. 26.) The crew handbook states that employees will be automatically terminated if they miss two shifts in a row or are habitually late. (Tr. 53.) Respondent does not maintain a written policy regarding the consequences to an employee if he or she misses a mandatory all-store meeting. (Tr. 53–54.)

B. Patrick Leeper's Employment with Respondent

Patrick Leeper was employed by Respondent at its Delmar store from February 2011 until May 6, 2014, when he was terminated by Respondent for allegedly missing an all-store meeting and poor performance. (Tr. 228.) When Leeper was hired, he earned $8 per hour and he earned $8.80 per hour at the time of his termination. (Tr. 228.) Leeper's development journal indicates that he received a "final warning" after a conversation about his performance in February 2013. (GC Exh. 9.) Leeper was also late to an all-store meeting in October 2013, however there is no evidence in the record that Leeper was disciplined or had a conversation with any manager about his tardiness on this occasion.[6] (GC Exh. 9; Tr. 256.)

Leeper received regular performance reviews as part of his employment with Chipotle. (GC Exhs. 10, 25; CP Exh. 3.) These reviews rate employees in a number of areas: food; people; equipment; customer service; additional expectations; and overall performance. (GC Exh. 10, 25.) In each area, the employee is rated above expectations, meets expectations, or needs improvement. Leeper was not rated below meets expectations in any of his performance reviews from 2011 until May 2014. (GC Exh. 10; CP Exh. 3.) Golliday, an admitted agent and service manager of Respondent, testified in his pretrial affidavit that Leeper was considered a good employee and showed a lot of constant effort and desire.[7] (Tr. 103, 106.)

C. Leeper's Activities with the Union

Leeper was a member of the Union and actively participated in its "Show Me 15" campaign, which seeks to raise the minimum wage in Missouri to $15 per hour. (Tr. 156, 232, 266.) On May 9, July 29, and August 29, 2013, Leeper participated in protests (also called strikes) around St. Louis. (Tr. 234, 237, 239.) During these strikes, union members carried banners and signs and wore t-shirts displaying messages aimed at raising the minimum wage. (Tr. 235–236.) Leeper missed work to participate in the May and August 2013 strikes. (Tr. 234, 244.) Leeper's strike activity was discussed among Respondent's managers.[8]

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[6] I do not credit Healy's testimony that Leeper received a "final warning" for being late to this meeting. His testimony was contradicted by Leeper's development journal, which contains no mention of a final warning related to tardiness at this meeting, and the testimony of Brownlee. (GC Exh. 9; Tr. 125–126.)

[7] Healy, Golliday, and Brownlee all gave testimony at the trial that Leeper was a low performer. In this instance, I credit Golliday's affidavit testimony that Leeper was a good employee as it is corroborated by Leeper's performance reviews and because I did not find Healy, Brownlee, or Golliday to be credible witnesses.

[8] Although Healy testified that Leeper's strike activity was never discussed among Respondent's managers at weekly management meetings, I find that it was. (Tr. 55.) Healy's testimony on this point

Prior to the May 2013 protest, Healy received a letter indicating that Leeper would be protesting that day. (GC Exh. 4; Tr. 54–55.) Healy called Wurdack as soon as he received this letter. (Tr. 55.) Leeper was met by Healy and Wurdack when he returned to work following this protest. (Tr. 236.) Wurdack told Leeper that he let the store down, let Chipotle down, and let his coworkers down. (Tr. 237.) Wurdack asked Leeper what would happen to him if he did this [protested] again. (Tr. 237.) Leeper replied that he would be fired. (Id.) Wurdack said okay, great, and the meeting ended.[9] (Id.) Shortly thereafter, Healy told Leeper not to bring this stuff to Chipotle and to let him [Healy] know the next time he [Leeper] went on protest. (Tr. 238.)

Following the August 2013 protest, two men appeared at Leeper's apartment looking for him. (Tr. 31, 244.) Then men knocked on Leeper's apartment door and were yelling his name. (Tr. 31.) Leeper's neighbor at the time identified Tim Healy as one of the men. (Tr. 32–33.) The men left when they realized that Leeper was not home. (Tr. 32.) The neighbor described a vehicle matching that of Healy's leaving the apartment complex. (Tr. 32.) Leeper's uncontroverted testimony established that Creggor, an admitted supervisor of Respondent, had driven Leeper to this apartment prior to the protest and, therefore, knew where Leeper lived at the time.[10] (Tr. 232–233.)

When he returned to work following the August 2013 protest, Leeper met with Healy. (Tr. 245.) Healy asked Leeper why he had to make things so awkward. (Tr. 245.) Leeper asked Healy what he meant. (Id.) Healy then asked Leeper to accompany him to the office. (Id.) In the office, Healy again asked Leeper why he had to make things so awkward. (Tr. 245.) Healy also said he had come to Leeper's home because he wanted to know what was going on. (Tr. 245.) Healy further stated that because of Leeper's protesting, he was getting flack from Wurdack and corporate.[11] (Tr. 245.)

At the end of the May and August 2013 protests, Leeper was accompanied back to work by a union delegation of clergy, community organizers, and community members. (Tr. 237, 242.) The delegation presented Healy with a letter on each occasion, explaining that Leeper had been

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contradicts that of Golliday. Although Golliday initially denied that Leeper's strike activity was discussed at a management meeting, he contradicted himself in both his pretrial affidavit testimony and his testimony on the second day of the trial. (Tr. 106; 363.)

[9] Wurdack was not called by Respondent as a witness at the trial and Healy was not asked about this conversation. Therefore, Leeper's testimony stands uncontroverted on this point.

[10] I found Leeper's neighbor, Alana Martin, to be a credible witness. She testified in a clear and forthright manner. Although she was not sure of the date of this incident, her testimony otherwise seemed sure and had the ring of truth. Martin's testimony did not waver in any meaningful way on cross-examination. Furthermore, Respondent did not call Creggor to rebut Leeper's testimony.

[11] Healy's testimony that he did not go to Leeper's apartment was unconvincing. Although he initially denied remembering what he was doing on August 29, 2013, the day of a strike, after being prompted Healy remembered that he had meetings with his bosses and was visiting stores "for the most part." (Tr. 77.) He said that the meetings "usually" went from about 9 a.m. to 5 p.m. (Tr. 78.) He later testified he "believed" he was with his bosses visiting stores. (Tr. 425.) When asked how he could be sure, Healy stated that he "went around and pulled up miscellaneous schedules that were posted or calendars" after the charge was filed in this case. (Tr. 434–435.) I find this testimony to be imprecise as it contains numerous qualifying words and I do not credit it.

exercising his legal right to protest. (GC Exhs. 4, 21; Tr. 235, 241–242.) On both occasions Leeper was allowed to return to work without discipline. (GC Exh. 9; Tr. 266–267.)

In addition, Leeper participated in a union trip to Memphis in April 2014 to visit the National Civil Rights History Museum. (Tr. 150–151, 249.) Just before the trip, Leeper learned that a coworker, Mojda Sidiqi, was hired at a rate of $11 per hour, a rate much higher than that of Leeper. (Tr. 246.) On the way to Memphis, Leeper discussed his concern regarding Sidiqi's higher wage rate with others. (Tr. 250.) A union organizer suggested that Leeper discuss his concern with other employees at the Delmar store. (Tr. 169, 250.)

D. Leeper Discusses Wages with his Coworkers

Leeper also discussed Sidiqi's wages with two supervisors, Alicia Johnson and Martay Love. (Tr. 246–249.) While observing Leeper helping another employee, Johnson asked him how much he was making. (Tr. 246.) Leeper replied $8.80. (Id.) Johnson then asked, "They have the nerve to be paying Mojda $11.00 an hour?" (Id.) Johnson told Leeper she would mention how little Leeper was being paid and how much hard work he was giving at an upcoming manager's meeting. (Id.) Love asked Leeper on a different occasion, "Can you believe Mojda makes $11.00 an hour?"[12] (Tr. 248.) Leeper discussed Sidiqi's wages with another employee, Thomas Schlumm, when he gave Schlumm rides home from work. (Tr. 284.) Brownlee admitted that he was aware that Leeper had been discussing Sidiqi's wages with others in April 2014. (Tr. 124.)

Leeper returned to work on April 7, the day after he returned from Memphis. (Tr. 250–251.) During his shift, Leeper told a coworker, Ross Mandernach, that Sidiqi was making $11per hour.[13] (Tr. 252.) Mandernach became upset when he learned of Sidiqi's higher wage rate. (Tr. 252, 294.) During the conversation, Service Manager Desmond Golliday appeared. (Tr. 252, 290–291.) He asked Mandernach who told him that [Sidiqi] made $11 an hour. (Tr. 252.) Mandernach did not reply, but Leeper admitted it was him. (Tr. 252–253.) Golliday told Leeper and Mandernach that we can't be talking about those things because he could get in trouble if they were talking about wages. (Tr. 253.) Golliday further told Mandernach and Leeper that Healy had instructed managers that nobody can be discussing wages and that Golliday was to

[12] Love was not called as a witness by Respondent at the trial. I credit Leeper's testimony that he had the conversation with Love, as it is corroborated by Love's performance review of April 10 in which Healy stated, "I want you to do a much better job with [] staying out of the drama or if you hear something make sure you quickly bring it to the attention of the management team." (GC Exh. 25.) Additionally, Respondent failed to ask Johnson about this conversation with Leeper and Leeper's testimony regarding this conversation stands uncontroverted.

[13] Leeper testified that he was helping Mandernach marinate meat during their conversation, while Mandernach and a supervisor testified that Leeper was not working at the time of this discussion. I do not find it material whether Leeper was working or not, as the conversation was brief.

inform Healy immediately if anyone was discussing wages.[14] (Id.) Golliday told Leeper to go on break and called Healy.[15] (Tr. 62, 253.)

When Leeper returned from his break, Golliday informed him that Healy was on the phone for him in the office.[16] (Tr. 253.) Healy asked Leeper what he was hearing. (Tr. 253.) Leeper said it hurt to know that everyone else was making more than him and that [Sidiqi] was making $11 per hour. (Tr. 253.) Healy asked Leeper who told him that [Sidiqi] made $11 per hour. (Tr. 253–254.) Leeper said a bunch of people. (Tr. 254.) Healy then said that we don't talk about wages in the workplace because it creates drama and makes the workplace awkward. (Tr. 254.) Healy said the next time I hear you speaking about wages in the workplace, we will be parting ways. (Tr. 254.) Leeper said yes. (Tr. 254.) Healy asked if Leeper heard him, to which Leeper replied yes. (Tr. 254.) Healy asked if they had an understanding, to which Leeper again replied yes. (Tr. 534.) The conversation ended shortly thereafter.[17] (Tr. 254.)

Although Healy testified that he had no further contact with the Delmar store that evening, I do not credit his testimony. (Tr. 109.) Healy's phone records show two text messages from Golliday's cell phone number just after Healy spoke to Leeper.[18] (GC Exh. 6, p. 1317.)

Mandernach received a performance review shortly after discussing Sidiqi's wages with Leeper. In this review, dated April 10, Mandernach was rated needs improvement in the area of "Resolves any issues with team members quickly." (GC Exh. 25.) By way of explanation, Healy stated, "The one [] marked NI [is] due maybe to maybe a person coming to you with something and instead of you not getting involved you find yourself right in the middle of it all." (GC Exh. 25.) I find that the comments in performance reviews of Love and Mandernach were veiled references to their discussions of wages with Leeper and Healy's disapproval of such discussions.

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[14] Leeper's uncontroverted testimony establishes that Respondent's employees were allowed to discuss a wide variety of topics while working, including sports, cars, and parties. (Tr. 231.) Golliday testified that if he were to observe employees discussing wages in the workplace, he should stop them and tell them they had a task to perform. (Tr. 372–373.)

[15] I have credited Leeper's version of the conversation over that of Mandernach. Mandernach gave much of his testimony in response to leading questions posed by Respondent's counsel. Leeper's recall seemed more detailed and specific than that of Mandernach. However, Mandernach's testimony corroborates that of Leeper in many respects, including that he and Leeper were discussing their displeasure with Sidiqi's higher rate of pay, that the conversation was interrupted by Golliday, that Golliday told Leeper he couldn't be talking about wages, and that Leeper spoke with Healy that evening. (Tr. 289. 291, 292, 293.)

[16] Healy's cell phone records establish that a 34 minute call took place on the evening of April 7 between Healy's cell phone number, (314) 800-4308, and the Delmar store, (314) 678-3200. (GC Exh. 6.)

[17] I credit Leeper's version of this conversation over that of Healy. Initially, I note that Healy denied that he spoke to Leeper that night in his pretrial affidavit, but at the trial acknowledged talking to Leeper. (Tr. 437.)

[18] Golliday's cell phone number is (314) 601-2709. Respondent did not produce these text messages despite the General Counsel's explicit subpoena request for them and Charging Party's subpoena requests for communications regarding employees discussing wages.

E. Union Organizers Come to the Delmar Chipotle

On April 25, three union organizers, including James Houston and Celina Stien-della Croce, came to the Delmar Chipotle for lunch. (Tr. 181, 198.) While ordering lunch, they spoke to employees preparing their orders about Show Me 15, then took seats in the dining room to eat. (Tr. 182, 198, 392-393, 427.) Healy saw them and recognized one of the organizers from a previous visit. (Tr. 427.) While they were eating, employee Roderick Warren came into the store to pick up his paycheck stub. (Tr. 183, 199, 427, 500.) When Warren left, organizer James Houston followed him out to the parking lot to discuss Show Me 15. (Tr. 183, 200, 427.) Healy followed Houston out to the parking lot under the guise of wanting to throw away a box. (Tr. 183, 200, 427.)

While in the parking lot, Houston spoke to Warren near Warren's vehicle. (Tr. 200, 500.) Houston asked Warren if he knew about the Show Me 15 campaign and Warren said he had heard about it from Leeper. (Tr. 200.) Warren also said he was making more than Leeper. (Tr. 200.) When Healy came out of the store, he approached Warren's vehicle and told Warren that he did not need to talk to Houston. (Tr. 201.) Healy said that he was taking care of Warren and that Warren did not need to be involved in the campaign or be on strike. (Tr. 201.) Healy then asked Warren if Houston was bothering him. (Id.) Warren said he was okay. (Id.) Healy threw the box he had in his hands away and came back over to Warren's vehicle. (Tr. 201.) Healy said that Warren could make plenty of money with the company, up to $30,000 to $40,000. (Tr. 201.) As Warren looked uncomfortable, Houston ended the conversation and went back inside the restaurant. (Tr. 201–202.)

Warren testified that while in Respondent's parking lot, Houston asked him questions about his job, his pay, and whether he was being treated fairly. (Tr. 500.) He also confirmed that Healy asked him if he was okay and said that he did not need to speak to Houston anymore. (Tr. 500.) Healy and Warren testified that Houston said that "they don't promote blacks" or mentioned race in his conversation with Warren. (GC Exh. 16(b); Tr. 428, 500.) Whether Houston made this alleged statement concerning race is not material to the violations alleged. Additionally, although Houston did not mention making a remark about race, I do not find that this detracts from his overall credibility.[19]

F. Leeper Misses an All-Store Meeting

Respondent held an all-store meeting at 7 a.m. on May 4. (Tr. 256). Leeper was aware of the meeting, but did not attend because he overslept. (Tr. 257.) When he realized that he had overslept, Leeper called Warren's cell phone. (Id.) Thereafter, Brownlee and Leeper had a

[19] I do not credit Warren's or Healy's versions of this conversation and instead credit Houston's. Houston testified in a plain and understandable manner and did not waver on cross-examination. Healy and Warren contradicted each other as to what Healy said. For example, Warren stated that Healy said he did not have to talk to Houston while Healy denied making such a statement. Additionally, although Warren said he had a conversation with Healy about this interaction after Houston left, in which Healy asked him about what happened, Healy testified that he did not see Warren again for a while after the incident. (Tr. 428, 501.) I do not credit Healy's testimony as I did not find him to be a credible witness. I credit Warren's testimony to the extent it corroborates that of Houston.

phone conversation in which Leeper explained to Brownlee that he missed the meeting because he had overslept. (Id.) Leeper offered to come in to work, but Brownlee said not to, indicating that he would give Leeper a recap on Monday or Tuesday.[20] (Id.)

Although Respondent maintains that all employees are required to clock in for all-store meetings, it is apparent that this policy is not followed. Records produced by Respondent showed that only 5 of Respondent's 15 employees clocked in for the May 4 meeting. (GC Exhs. 2, 7(c); R. Exh. 13.) There is no official record of who attended this meeting, only the recollection of some of Respondent's employees that Leeper and employee Jose Murillo missed the meeting. Murillo was excused from the meeting in advance because he had childcare issues.

On May 5, Respondent prepared a performance review for Leeper. (GC Exh. 25.) Nowhere in this performance review does it indicate that Leeper had been terminated. However, the review does indicate that "Pat sometime finds himself in the middle of drama that does not need to be there, and because of this he is not showing that he cares about the success of others." (GC Exh. 25.) Unlike in all of his previous reviews, Leeper was rated Needs Improvement in some areas.[21] (Id.)

G. Events Preceding Leeper's Discharge

On May 6 at about noon another union delegation came to the Delmar Chipotle to meet with Healy. (Tr. 66, 178, 383.) Stien-della Croce recorded the conversation on her cell phone. (GC Exhs. 16(a) and (b); Tr. 180). Stien-della Croce introduced herself and the delegation as being from the fast food workers union. (GC Exh. 16(b).) She told Healy that she had been told of veiled threats to employees about participating in concerted activity, in violation of Federal labor law. (Id.) When Healy asked what the threats were about, Stien-della Croce said "participating in union activity." (Id.) After a discussion about the interaction between Houston and Warren a few days earlier, Stien-della Croce stated that she had heard from multiple employees that Healy had been interfering with workers' rights to participate in concerted activity by making veiled threats that if they do they may lose their jobs or other negative things will happen. (Id.) Healy responded that whatever Stien-della Croce heard was false because, as far as Healy knew, only Leeper had "done anything like that." (Id.) Healy went on to say that whatever Pat does is up to him and, "I told him like if you want to move up in your career this is what I need you to do" (Id.) Healy then clarified that he was referring to "work related stuff . . . [like] getting more leadership."[22] (Id.)

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[20] I credit Leeper's version of this call over that of Brownlee's. Brownlee's trial testimony contradicted his pretrial affidavit testimony. Specifically, I do not credit Brownlee's testimony that Leeper called him after the meeting and claimed to be sick. Respondent provided no evidence, such as phone records, to corroborate this testimony. Also, as Respondent did not call the author of a newspaper article in which Leeper allegedly said he called in sick for the meeting, I was not persuaded that Leeper made this statement to the reporter, as Leeper denied making it.

[21] If Healy had already decided to discharge Leeper, as he claimed at trial, he would have had no reason to complete this performance review. I do not credit the testimony of Healy and Brownlee that they decided to terminate Leeper on May 4 for the reasons set forth below.

[22] Although Healy testified that he did not mention Leeper's name during this meeting, the transcript of this conversation establishes that Healy brought up Leeper's name at least twice. (GC Exh. 16(b); Tr.66–67, 413–414.)

Stien-della Croce then said if Healy would promise not to interfere with workers' rights to unionize there would be no problem. (GC Exh. 16(b).) Healy again mentioned that Stien-della Croce did not have his side of the story. (Id.) Healy said that Leeper had been involved in with "union stuff" twice and was still employed there. (Id.) Healy said that he had never made any kind of threat or fired anybody over anything. (Id.) Stien-della Croce said that she had heard otherwise, but so long as it ends, there would be no issue.[23] (Id.)

H. Healy Discharges Leeper

Leeper reported for his next scheduled shift on May 6 at 3 p.m., just hours after Stien-della Croce and her delegation had left. (Tr. 258.) About 2 hours into Leeper's shift, Healy approached him and asked him to sit down in the lobby. (Tr. 259.) Healy asked Leeper if he was aware that he had missed the [all-store] meeting and Leeper said yes. (Tr. 259.) Healy asked why and Leeper replied that he had overslept. (Tr. 259.) Healy said okay, we are parting ways and Leeper got up and walked away. (Tr. 259.)

Healy had a page out of Leeper's development journal on the table at the time he discharged Leeper. (GC Exh. 8; Tr. 259.) The document indicates that Leeper failed to show up for an all-store meeting and is not a top performer due to a lack of desire. (GC Exh. 8; Tr. 260.) The entry further states, "In order to bring the Vision [sic] to life we must have a team of ALL top performers, so we are terminating your employment immediately." (Emphasis in original) (GC Exh. 8.) Leeper did not look at the journal entry, dated May 4, as he left the store immediately after Healy told him that they were parting ways. (Tr. 259.)

I. Respondent's Other Disciplinary Records

In joint exhibits, the parties presented the employment records of three other employees who were purported to have been discharged for missing all-store meetings. (J. Exh. 1-3.) However, none of these individuals had similar employment records to Leeper. Leeper had been one of Respondent's longest serving employees, while the three employees in these exhibits each worked for Respondent for less than 90 days at the time of termination. (J. Exh. 1-3; GC Exh. 2; Tr. 49–52.) Employee Benjamin Wisniewski started working at the O'Fallon store on August 4, 2013, and was discharged on October 27, 2013, after missing an all-store meeting. (J. Exh. 1.) Furthermore, during his short employment, Wisnewski was advised three times that he needed to show more improvement. (Id.) Employee Jessica Koslow started working at the Creve Coeur store on December 10, 2013, and was terminated on January 12, 2014. (Jt. Exh. 2.) Additionally, Koslow's records contain no development journal entries or performance reviews demonstrating the reason for her termination. Employee Sarah Duff started working at the O'Fallon store on August 27, 2013, and was discharged on October 27, 2013, after missing an all-store meeting. (Jt. Exh. 3.)

[23] Healy mentioned that Leeper still worked there twice during the conversation. Had Healy already decided to discharge Leeper, as he testified at trial, these statements that Leeper still worked there were, at best, misleading.

The General Counsel presented records of employees who were not terminated for missing all-store meetings. Employee Caleb Dalton received only a written warning for missing a mandatory all-store meeting in December 2013. (GC Exh. 35.) Dalton's records indicate that he had received a verbal warning a month earlier for being 1 hour and 25 minutes late for his shift. (Id.) Furthermore, Dalton missed an entire shift the day prior to missing the all-store meeting in December 2013. (Id.) Another employee, Gabriela Hernandez, only had a conversation recorded in her development journal as a result of missing an all-store meeting in November 2013. (GC Exh. 36.)

Testimony also establishes that Respondent did not discipline employees as severely, if at all, for missing or being late to all-store meetings. A former service manager of Respondent, Xavier Anderson, testified that employee Ken Rose was late to an all-store meeting in April 2013 at the Clayton store, which was managed by Wurdack, and received no discipline. (Tr. 93.) Other employees appeared late for the same meeting, as a result of a minor traffic accident, and were excused without any discipline.[24] (Tr. 92.)

Michael Vroman, a current manager of Respondent, testified that employee Heather Mills missed an all-store meeting and was terminated as a result. (Tr. 307–308.) However, in examining Mills' employment records, which were not turned over to the General Counsel or Charging Party in advance of the hearing, she was never issued any discipline because she never returned to work after missing the meeting. (Tr. 308-309.) Instead, Vroman testified that she was "terminate[d]" in Respondent's system," but Respondent considered this a voluntary termination or resignation.[25] (Tr. 308–309, 326.)

J. Respondent's Failure to Produce Documents Pursuant to the General Counsel's and Charging Party's Subpoenas

Both the General Counsel and Charging Party issued subpoenas duces tecum to Respondent in the weeks leading up to the trial. (GC Exhs. 22, 23, 34; CP Exh. 1.) The General Counsel's subpoenas were also sent to Respondent's counsel via regular mail with a cover letter and via email. (GC Exhs. 38, 49.) Respondent filed motions to quash (i.e., petitions to partially revoke) the General Counsel's subpoenas. The Regional Director referred these petitions to me for ruling in accordance with Section 102.31(b) of the Board's Rules and Regulations. (GC Exh. 24.) Thereafter, I issued an order to show cause and advised Respondent's counsel that he should be prepared to produce all subpoenaed documents at the trial in the event of an adverse ruling. (Tr. 345.) I issued an order denying in part and granting in part Respondent's motions on September

[24] I found Anderson to be a credible witness. His brief testimony did not waver on cross examination. He also candidly admitted that he was terminated by Respondent for not meeting expectations.

[25] As a result of Respondent's failure to disclose Mills' employment records, The General Counsel and Charging Party asked that I strike Vroman's testimony. (Tr. 309.) However, I sanctioned Respondent during the hearing by limiting Vroman's testimony and refusing to permit further testimony on Mills' termination. Instead, I allowed Respondent to make an offer of proof. (Tr. 309-316.) In accordance with my conclusions regarding subpoena non-compliance, contained in the record at pp. 316 and 558–559, I give little weight to Vroman's testimony given at pp. 320–326 of the record, except where it provides context to other testimony or is inherently probable. See *People's Transportation Service,* 276 NLRB 169, 225 (1985) (multifactor analysis for determining appropriate sanction for delayed production of documents). (Tr. 558.)

8, 2 days before the start of the trial. (GC Exh. 24.) Respondent did not file a petition to revoke the Charging Party's subpoena.

At the outset of the trial, Respondent produced five boxes of documents to the General Counsel. (Tr. 13.) However, counsel for the General Counsel reported that Respondent had not fully complied with its subpoena requests. (Tr. 14-–19.) Specifically, the General Counsel reported that Respondent had not provided or had made an incomplete production of: employee rosters on the dates of all-store meetings; time records showing which employees attended the meetings; performance reviews; performance (development) journals; and time records for certain employees. (Tr. 16–18.) Respondent's counsel assured the General Counsel that they would continue to work on producing the records as the trial progressed. (Tr. 18.)

As the trial progressed, the General Counsel continued to indicate that Respondent was not complying with the General Counsel's subpoenas. (Tr. 214, 276.) Respondent's counsel provided updates on document production and indicated that he would continue searching for documents. (Tr. 304.) Some of the paragraphs to which Respondent had made an incomplete production were not disputed in its petitions to revoke. (Tr. 345.)

At one point in the trial, I called Healy as a witness in order to better ascertain Respondent's efforts toward subpoena compliance and how Respondent tracks employees who are discharged or resign. (Tr. 332–336.) After questioning Healy, it became apparent that Respondent's efforts at subpoena compliance had been inadequate. I also noted that Respondent had not met its burden to show that the General Counsel's subpoena requests were unduly burdensome. Therefore, I gave Respondent one week from the close of the first hearing session to comply with the subpoenas in their entirety, with the exception of any subpoena paragraphs which were limited by my previous rulings or by agreement of the parties. (Tr. 346.) I advised the parties that I would leave the record open for the General Counsel or Charging Party to call additional witnesses, recall witnesses, or to admit additional evidence. (Tr. 346.) I further warned Respondent's counsel that failure to comply with the subpoenas could result in my drawing an adverse inference against Respondent. (Tr. 347.) I restated my ruling at the close of the second day of the trial. (Tr. 517.)

Thereafter, on September 23, Respondent filed affidavits from Golliday and Brownlee, seeking to correct their testimony. (R. Exh. 18.) Both Brownlee and Golliday testified at the hearing, in contradiction to Healy's testimony, that they were not instructed by anyone to search their cell phones for text messages related to this case. (Tr. 371, 384.) However, in their nearly identical post-trial affidavits, both stated that they misunderstood the General Counsel's question as to whether Healy had ever asked them to search for text messages and answered in this way because they were following my order "not to discuss [their] testimony with anyone, including Mr. Healy, during the hearing." (R. Exh. 18.) Instead, both indicate that they met with Healy and Respondent's counsel to discuss the existence of text messages. (R. Exh. 18.) As I explained at the hearing, I left the record open after September 11 for the General Counsel and Charging Party to admit further evidence in light of Respondent's noncompliance with their subpoenas. (Tr. 559.) The record did not remain open for Respondent to admit further evidence. Respondent's counsel were present in the room when both Golliday and Brownlee gave their testimony that Healy did not instruct them to look for text messages regarding Leeper, but did not seek to correct any mistake or misperception at that time.

On October 3, the General Counsel and Union each filed a motion for sanctions and to strike the affidavits of Golliday and Brownlee. (GC Exhs. 53, 54.) Respondent filed a written response on October 10. (GC Exh. 56.) I granted the motions to strike as Respondent cited no authority for the late filing of the posttrial affidavits and as the affidavits do not constitute newly discovered evidence that existed at the time of trial, but of which the party was excusably ignorant. *Fite/Lucent Technologies,* 326 NLRB 46, 46 fn.1 (1998). (Tr. 559.) Therefore, I reaffirm my ruling striking the post-trial affidavits of Golliday and Brownlee and rejecting R. Exh. 18.

On October 15, I granted the General Counsel's and Charging Party's motions for sanctions. (Tr. 554-559.) A party has an obligation to begin a good-faith effort to gather responsive documents upon service of a subpoena and a party who fails to do so, does so at its peril. *McAllister Towing & Transportation,* 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). In *Metro West Ambulance Service,* 360 NLRB No. 124, slip op. at 2 (2014), the Board found it appropriate to draw an adverse inference against a respondent who failed to produce accident reports in response to the General Counsel's subpoena. Similarly, in this case, despite my repeated warnings, Respondent failed to produce numerous documents or conduct a diligent search for documents. For example, Respondent failed to produce records of employees who missed all-store meetings and were not terminated, to produce records regarding the dates of all-store meetings, and produced some records to the General Counsel, but not the Charging Party. (GC Exhs. 53, 54.)

Based upon my findings, I drew an adverse inference that had Respondent conducted a diligent search, it would have uncovered records showing that other employees of Respondent had missed all-store meetings and were not terminated. (Tr. 558.) I further drew an adverse inference that had Respondent diligently searched its records it would have found and produced records which would not have supported its case, but would have instead supported the cases of the General Counsel and Charging Party. (Tr. 558–559.) Imposing such a sanction lies within the discretion of the trial judge. *McAllister Towing & Transportation,* 341 NLRB at 394.

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622.

My credibility findings are generally incorporated into the findings of fact set forth above. My observations, however, were that the General Counsel's witnesses were composed and forthright when they testified. By contrast, Respondent's witnesses (particularly Healy and

Golliday) took great pains to maintain Respondent's positions in this case, only to have their testimony and credibility undermined by documentary evidence and by other witnesses.

Respondent's witnesses evinced a single-minded desire to reiterate the message that Respondent did not forbid discussions about wages, did not bear animus toward Leeper's union activities, and did not fire Leeper for his union and other protected concerted activity. However, Respondent's witnesses were unable to consistently explain what transpired on the night of April 7, when Leeper was interrogated and threatened for discussing wages with Mandernach, or the events surrounding the decision to discharge Leeper. Furthermore, Respondent's witnesses frequently gave trial testimony that contradicted their sworn pretrial affidavit testimony and Respondent's other witnesses. In addition, some of Respondent's witnesses changed their testimony between the first and second days of the trial.

I find that Healy was not a credible witness. His overall demeanor on the witness stand, almost complete unwillingness to concede even basic premises, and frequent sparring with counsel for the General Counsel and Charging Party detracted from his overall credibility. For example, he engaged in the following exchange with counsel for the Charging Party when asked about Leeper's development journal:

> Q: . . . I want you to tell me whether there's anything in there that reflects any record of attendance problems in Patrick Leeper's performance?
> A: Well, there is; it's in Chipotle lingo.
> Q: Chipotle lingo? Okay, show me[.]
> A: For example on February 12, 2013 it said, "Patrick is not putting up constant effort in his work here."
> Q: Okay.
> A: So we try to take every situation and every instance that there is with us and dial it back to those five points of being a top performer.
> Q: So Patrick is supposed to read that sentence that he's not putting up consistent effort in his work here and conclude that that was about his attendance?
> A: Well, I'm not saying that it was about the attendance.

(Tr. 474). This line of questioning continued and Healy refused to concede that nothing in Leeper's development journal spoke to problems with his attendance, only stating that the words attendance, tardy, or absence do not appear in the journal. (Tr. 476.)

Healy's testimony regarding his conversation with Stien-della Croce was undermined by the transcript of that recording. For example, Healy testified that he was not sure if he mentioned Leeper's name during the conversation. (Tr. 66.) In his affidavit, Healy specifically denied mentioning Leeper's name. (Tr. 67.) The recording establishes, however, that Healy mentioned Leeper's name at least twice. (GC Exh. 16(a) and (b); Tr. 67.) Healy further testified that prior to Leeper's termination he was only aware that Leeper had participated in one strike, however, in the recording he mentions two strikes. (GC Exh. 16(a) and (b); Tr. 29, 424–425.)

Healy initially denied that Golliday called him at home on April 7 because Leeper was discussing wages. Instead, he testified that Golliday called because Leeper wasn't working and he was harassing other employees. (Tr. 60.) However, Healy gave the following sworn pretrial

affidavit testimony regarding this incident, "I received a call from Desmond Golliday while I was at home. Golliday told me that he was having a situation at work where Leeper was discussing the wages of another employee and whether the employee was worth it." (Tr. 62.)

At the hearing, Healy admitted speaking to Leeper on April 7. (Tr. 436.) However, in his pretrial affidavit, Healy denied speaking with Leeper at that time. (Tr. 437.) When questioned about this inconsistency, Healy testified that his recollection was probably better on the day of the hearing, September 11, 2014, than it was when he gave the affidavit, June 26, 2014. (Tr. 428.) Healy gave his affidavit only about 2–1/2 months after the incident of April 7 and it defies credulity that his memory was not fresher at that time than it was over 5 months after the incident. Additionally, Healy admitted that he did not attempt to correct this misstatement, even though in his affidavit he agreed to immediately notify the Board Agent if he remembered anything else important or wished to make any changes. (Tr. 439.)

Furthermore, Healy appeared to embellish his testimony to make it more favorable to Respondent's position as the trial progressed. On the first day of the trial Healy testified, as above, that Golliday called him at home because Leeper wasn't working and was harassing employees. (Tr. 60.) On the second day of the trial, after being confronted with his contradictory affidavit testimony, Healy expanded his testimony regarding his conversation with Golliday, stating:

> [Golliday] said that people were talking about things, but really the biggest thing that chimed in my ear was the word 'uncomfortable.' And as soon as I heard that word, I immediately was like okay, this – if somebody feels uncomfortable, I need to find out what is going on . . . [T]he biggest thing he said to me was that Patrick was standing around not working, bothering [Mandernach] while [he] was working. And I said, well, what are they talking about? What's going on? And he said that they were talking about wages and pay and that kind of thing. And I said, okay, is Pat working or is he just standing around? And he said that he was standing around. And I said, okay, if he's standing around, you have the right to go tell him to get back to work at least.

(Tr. 423–424.) Healy did not mention the word "uncomfortable" in his testimony on the first day of the trial. In sum, due to the numerous inconsistencies in his testimony, the contradictions between his testimony and his affidavit testimony, and the contradictions between his testimony and that of other witnesses, I did not find Healy to be a credible witness.

I did not find Golliday to be a credible witness. His testimony was generally vague and nonspecific, and often contradictory. Golliday quibbled with counsel for the General Counsel and seemed to go to great lengths to avoid using the word "wages." For example, he engaged in the following exchange with the General Counsel:

> Q: And do you know what Ross [Mandernach] and Patrick [Leeper] were talking about?
> A: I came into the back, and had saw that they were talking, and I heard, he's about to ask me a question about wages . . .

Q: So did he say wages was a part of this conversation?
A: When he started talking, he said something about money. Then I just cut it off . . .
. . .
Q: Ross? And what did Ross ask you?
A: He started saying, hey, I heard about—and I was like—and he said something like—I don't remember exactly what it was because it was so long ago. He just asked me something about wages or money or something. And I said whoa, just get back to work. You know you just can't stand around not doing anything.
Q: Okay. So the topic of wages was brought up that evening?
A: You want to say it was wages, then yes.

(Tr. 109–110.)

Furthermore, Golliday gave numerous explanations for why he called Healy after observing Leeper talking to Mandernach about wages. Initially, Golliday said he contacted Healy because Leeper was talking to another employee and that employee was getting mad. (Tr. 108.) Then he said that he called Healy because he was never in a situation where an employee was upset. (Tr. 111.) Then he said that he called Healy because he did not want anything to happen on his shift. (Tr. 113.) In the testimony quoted above, Golliday admitted that Leeper and Mandernach were discussing wages. However, each of these explanations contradicts Golliday's sworn pretrial affidavit testimony in which he averred that "I have never facilitated a conversation by telephone or otherwise between Healy and Leeper about discussion of wages in the workplace." (Tr. 114.) Furthermore, Golliday's testimony is contradicted by the pretrial affidavit testimony of Healy, in which Healy admitted that Golliday called him because Leeper was discussing the wages of another employee. (Tr. 62.)

Golliday also gave testimony that Leeper did not show a lot of constant effort and desire, one of Chipotle's hallmarks of a top performer. (Tr. 103.) However, in his pretrial affidavit Golliday testified that Leeper was a good worker and, "It consistently came up that he was a good employee. Leeper showed a lot of constant effort and desire." (Tr. 106.)

Golliday also gave other trial testimony in an attempt to bolster Respondent's case that was inconsistent with his pretrial affidavit testimony. For example, Golliday testified that Healy sat down with him on May 5 and told him that he intended to fire Leeper for missing an all-store meeting. (Tr. 365–366.) However, his affidavit indicated that Healy called him on his cell phone to tell Golliday about Leeper's impending discharge. (Tr. 366.) By way of explanation for this contradiction, Golliday incredulously claimed that he was not thinking clearly when he gave his affidavit. (Tr. 366.) I note that no such cell phone call is supported by Healy's cell phone records and this testimony was clearly an attempt by Golliday to support Respondent's position that Healy decided to discharge Leeper prior to May 6. I do not accept his explanation, however, as Golliday's affidavit was given on June 26, only about 2 months after the incidents in question.

Like Healy and Golliday, I did not find Brownlee to be a credible witness. Brownlee gave often jumbled and imprecise testimony. For example, Brownlee responded yes when asked by the General Counsel whether Healy wrote in Leeper's development journal on the day he told

Leeper he was terminated (May 6). (Tr. 127.) After prompting by Respondent's counsel that he may not have understood the question asked by General Counsel, Brownlee gave the following testimony:

> Q: (After being shown Leeper's discharge development journal entry, GC Exh. 8). Was that written on 5/4 of '14?
> A: I can't recall. I believe it was. Yes, it was.

(Tr. 128.) However, this testimony conflicts with his affidavit testimony, in which he stated:

> Leeper's next shift was a night shift, but I do not recall if it was the next Monday or Tuesday. Before Leeper's shift, Healy told me that he was going to deliver the news to Leeper that he was discharged. Healy told me that he did not want me to say anything because I was in training.
>
> I was nervous because it was a confrontation. Healy told me not to be nervous, and that every time he had fired someone they shook his hand. *Healy then wrote in Leeper's development journal then, that he missed he meeting on May 4th, 2014.* (Emphasis added.) (Tr. 133.)

(Tr. 133.) In addition, nowhere in Brownlee's affidavit testimony, given closer in time to the events at issue, did he mention that the decision to fire Leeper was made on May 4. (Tr. 388–389.)

When called by the General Counsel on the first day of the trial, Brownlee testified that Healy alone wrote in Leeper's development journal regarding the discharge. (Tr. 127.) Counsel for Respondent then asked the following question, "What is your best recollection of when you and Mr. Healy wrote that?" (Tr. 129.) After an objection, Respondent's counsel asked who wrote the entry, to which Brownlee answered, "Tim." (Tr. 129.) However, when called as a witness by Respondent on the second day of the trial, Brownlee testified that both he and Healy wrote in Leeper's development journal. (Tr. 383.) This testimony contradicts both his pretrial affidavit testimony and his testimony on the first day of the trial. (Tr. 386.)

Brownlee also could not provide a cogent explanation of whether Leeper's past performance, as recorded in his development journal, was part of the reason for his discharge. Initially Brownlee testified that Leeper's status as a low performer led to his termination. (Tr. 389.) He further testified that he and Healy reviewed Leeper's development journal. (Tr. 390.) Brownlee next testified that Leeper would have been terminated for missing the meeting even if he was not a low performer. (Tr. 390.) Brownlee then engaged in the following exchange with counsel for the General Counsel:

> Q: So you looked at the development journal and you saw that he's not the best employee?
> A: Yes.
> Q: Okay. So what was the purpose of reviewing the journal?
> A: To look at his performance.
> Q: Why did you want to look at his performance?

A: It's something we always do when we let someone go, we look at their development journal.
Q: If you had seen a different performance in there, could that have made a difference?
A: No.
Q: So there is no point?
A: If you want to say that.
Q: You could have skipped that step?
A: Yeah.

(Tr. 391.) He then testified that he really had no idea why managers look at development journals because he does not understand the process. (Tr. 399.) Brownlee finally testified that Leeper was fired because he missed the meeting and lacked desire and effort. (Tr. 397.)

I found Neal and Stien-della Croce to be credible witnesses. Both appeared forthright and were not shaken under cross-examination during their brief testimony. Stien-della Croce's testimony was corroborated by her recording of her conversation with Healy on May 6 and by the testimony of Leeper, who was a credible witness. Neal's testimony regarding the Union's purposes and activities was not rebutted in any way.

Leeper appeared to testify truthfully during the hearing. He candidly responded to questioning under cross-examination. His testimony was corroborated by other witnesses. For example, his testimony that he discussed his issue with Sidiqi's wages on a union trip was corroborated by Neal and Stein-della Croce. His testimony that he discussed Sidiqi's wages with coworkers was corroborated by Mandernach, Brownlee, and Schlumm. His testimony that he called the store on May 5 after he overslept on the morning of the all-store meeting was corroborated by Warren and Brownlee. He candidly admitted that he knew about the May 5 meeting. Therefore, where his testimony conflicts with other witnesses, I credit Leeper.

B. *Legal Standards Applicable to Alleged 8(a)(1) Violations*

The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), enfd sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center,* 330 NLRB 935, 941 (2000).

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer, via

statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. Id.; see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

C. Golliday's April 7 Interrogation and Statements Violated the Act

The General Counsel alleges that on April 7 Golliday interrogated employees about which employees had been discussing wages, told employees they could not talk about their wages, threatened employees with unspecified reprisals if they talked about their wages or other terms and conditions of employment, and told employees that all managers were instructed to report any employee discussions about wages and that no employee should be talking about wages. Respondent denies that Golliday interrogated employees or made the statements attributed to him. However, based upon the credible evidence, I find that Golliday interrogated employees and made the statements attributed to him in violation of Section 8(a)(1) of the Act.

Golliday told Mandernach and Leeper that they can't be talking about those things [wages] because he could get in trouble if they were talking about wages. Golliday also told Mandernach and Leeper that Healy had instructed managers that no one could be discussing wages. Golliday further said that Healy said that nobody can be discussing wages and that Golliday was to inform Healy immediately if anyone was discussing wages. All of these statements convey that employees of Respondent are not free to discuss their wages and that there will be repercussions if they do. By saying that he was required to tell Healy, the highest ranking manager at the Delmar store, if employees were talking about wages, Golliday conveyed to employees that there would be unpleasant ramifications for talking about wages. I find that Golliday's statements are likely to be perceived as coercive by workers. As such, I find that Respondent, through Golliday, violated Section 8(a)(1) of the Act by advising employees: (1) that they could not talk about wages; (2) there would be unspecified reprisals for talking about wages; and (3) by stating managers were instructed not to let employees discuss wages and to report employee wage discussions to Healy.

Moreover, I find that Golliday violated Section 8(a)(1) of the Act by interrogating Leeper and Mandernach about their discussion of wages. In considering the *Bourne* factors, I note that Golliday was the highest ranking supervisor in the store at the time. Golliday's comments also made clear that he was seeking the information in order to take action against the employees. After asking Leeper and Mandernach about who was discussing wages, he said that he needed to inform Healy. Moments later Golliday did, in fact, inform Healy of this discussion. This interrogation took place on work time and at the employees' work station. The coerciveness of the interrogation is also evident from the fact that Mandernach did not answer Golliday's question. Therefore, given the totality of the circumstances and in evaluating the *Bourne* factors, I find that Respondent, through Golliday, violated Section 8(a)(1) of the Act by interrogating Leeper and Mandernach on April 7.

D. Healy's April 7 and 25 Statements Violated the Act

The General Counsel alleges that on April 7 Healy interrogated Leeper about which employees had been discussing wages, told Leeper he could not talk about his wages, and threatened Leeper with discharge for talking about employee wages. The General Counsel further alleges that on April 26 Healy told an employee to refrain from talking to union representatives, told an employee to refrain from engaging in protected concerted activity, and impliedly promised an employee increased wages in order to discourage the employee's protected concerted activities. Respondent denies that Healy interrogated employees or made any of the statements attributed to him. However, based on the credible evidence, I find that Healy violated the Act by interrogating Leeper and by making statements to Leeper and Warren, as alleged.

Initially, I have found that Healy told Leeper that we don't talk about wages in the workplace because it creates drama and makes the workplace awkward. I have further found that Healy told Leeper that the next time he heard Leeper speaking about wages in the workplace, they would be parting ways. I find that Healy telling Leeper that they would be "parting ways" if Leeper again spoke of wages in the workplace constitutes a threat of discharge.[26] These statements constitute an unlawful direction not to discuss wages in the workplace and a threat of discharge for discussing wages. It is axiomatic that discussing terms and conditions of employment with coworkers lies at the very heart of protected Section 7 activity. *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 205 (2007). The Board has long found that it is unlawful for employers to prohibit employees from discussing wages among themselves. *Alternative Energy Applications,* 361 NLRB No. 139, slip op. at 1 (2014), citing *Waco, Inc.,* 273 NLRB 746, 747–748 (1984). Therefore, I find that Respondent, though Healy, violated Section 8(a)(1) of the Act on April 7 when Healy told Leeper he could not talk about wages and threatened him with discharge for talking about wages.

Furthermore, upon considering the totality of the circumstances, including the *Bourne* factors, I conclude that on April 7 Respondent, through Healy, unlawfully interrogated Leeper in violation of Section 8(a)(1) of the Act. Healy, the interrogator, was Leeper's manager and the highest ranking official at Respondent's Delmar store. Healy sought information concerning who told Leeper about Sidiqi's higher wage rate. Given the remarks in the performance reviews of the employees with whom Leeper discussed Sidiqi's wages (i.e. ratings of Needs Improvement and statements about engaging in unnecessary drama in the performance reviews of Mandernach and Love) it is a rational to infer that Healy sought this information to squelch talk of unfairness in the wage structure at the Delmar store. Furthermore, the place of the interrogation weighs heavily in favor of finding a violation. Leeper was called into the manager's office from his workstation and interrogated over the phone by Healy. For his part, Leeper refused to reveal the source of his information to Healy. Therefore, given the totality of

[26] The Board has long held that the fact of discharge does not depend upon the use of formal words of firing. *Hale Mfg. Co.,* 228 NLRB 10, 13 (1977), enfd 570 F.2d 705 (6th Cir. 1978). It is sufficient if the words or actions of the employer would lead a prudent person to believe that his or her tenure had been terminated. *Ridgeway Trucking Co.,* 243 NLRB at 1048-1049 (1979) enfd in relevant part 622 F.2d 1222, 1224 (5th Cir. 1980). Analogously, a threat of discharge need not contain formal words of firing. Healy's use of the words "parting ways" would lead a prudent person to believe he was being threatened with discharge. Also, Healy used these same words when he later discharged Leeper.

the circumstances and in evaluating the *Bourne* factors, I find that Respondent, through Healy, violated Section 8(a)(1) of the Act by interrogating Leeper on April 7.

Healy's statements to Warren on April 25 also violated Section 8(a)(1) of the Act. While Warren was talking to Union Organizer Houston, Healy approached Warren's car and told him he did not need to be talking to Houston. Healy further told Warren that he did not need to be involved in the campaign or be on strike. Finally, Healy said that Warren could make plenty of money with the company, up to $30,000 to $40,000. I find that each of these statements, when viewed objectively, would tend to coerce an employee in the exercise of his Section 7 rights.

Telling an employee not to talk to a union representative has been found to violate the Act. See *Evolution Mechanical Services,* 360 NLRB No. 33, slip op. at 17 (2014) (advising employees not to speak to union representatives found violative); *Advanced Architectural Metals,* 351 NLRB 1208, 1216 (2007) (supervisor's statement to an employee that if he had any problems to talk to her, not the union, found violative). Viewed objectively, Healy's statement to Warren that he did not need to be talking to Houston constitutes intimidation and an admonition not to speak to a union organizer. Similarly, Healy's statement that Warren did not need to be involved in the campaign or be on strike constituted an effort by Healy to discourage Warren from engaging on union or other protected concerted activity. Thus, Healy's statements violated the Act.

I further find that Healy's statement that Warren could make plenty of money with the company, up to $30,000 to $40,000, constituted an implied promise of benefit. In order to find an employer's promise of economic benefits unlawful, the Board focuses on whether the respondent intended to interfere with actual union activity among its employees. *Hampton Inn NY-JFK Airport,* 348 NLRB 16, 18 (2006); see also *Acme Bus Corp.,* 320 NLRB 458, 458 (1995) (violation found where respondent contrasted its own beneficence with the dangers of unionization). In this case, Healy advised Warren that he could make more money with Respondent immediately following his statements discouraging Warren from engaging in union activity. Thus, Healy contrasted Respondent's benevolence with the dangers of talking to Houston. Furthermore, Healy clearly sought to induce Warren to stop speaking to Houston, a union organizer, by reminding him of promotional opportunities within Chipotle and impliedly promising him increased wages. As such, Healy's statement violated the Act.

E. Leeper's Discharge Violated the Act

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line,* to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Nichols Aluminum*, 361 NLRB No. 22, slip op. at 3 (2014), citing *Amglo Kemlite Laboratories,* 360 NLRB No. 51, slip op. at 7 (2014). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183,

1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). If the General Counsel meets his burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line,* 251 NLRB at 1089; *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.,* 311 NLRB 498 (1993). Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for an employee's discharge and the timing between an employee's protected activity and the discharge. *Temp Masters, Inc.,* 344 NLRB 1188, 1193 (2005).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3–4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Leeper for engaging in concerted activities with other employees for the purposes of mutual aid and protection by his actions and conduct, including striking and speaking publicly in support of wage increases, discussing wages with other employees, and questioning Respondent's pay policies. Respondent argues, in its defense, that it did not engage in any discrimination or discourage membership in a labor organization. For the reasons discussed herein, I conclude that Leeper's engaging in union and other protected concerted activity, including his discussion with Mandernach regarding wages and his participation in the Union's strikes, was a motivating factor in his discharge.

With respect to the General Counsel's initial showing, it is undisputed that Leeper engaged in union activity through his protests in 2013. Furthermore, it is undisputed that Respondent, through Healy, was aware of this activity. In addition, Leeper engaged in protected concerted activity by discussing wages with Mandernach and other employees of Respondent. It is further undisputed that Healy, Brownlee, and Golliday were aware of this activity. At issue in this case is whether counsel for the General Counsel demonstrated that the Respondent harbored antiunion animus and animus toward Leeper's other protected concerted activity, thus meeting his initial burden. I find he has.

I have found a number of statements made by Respondent's supervisors and agents which establish the existence of animus. As to Leeper's union activity, I have found that in May 2013 Wurdack told Leeper that he let the store down, let Chipotle down, and let his coworkers down. Later Healy told Leeper not to bring this stuff to Chipotle and to let him [Healy] know the next time he [Leeper] went on protest. Following the August 2013 protest, Healy asked Leeper why he had to make things so awkward. Healy further stated that because of Leeper's protesting, he was getting flack from Wurdack and corporate. Although Healy's and Wurdack's threats

occurred outside the Section 10(b) period, they can be considered as background evidence of animus towards union activity. See *Wilmington Fabricator, Inc.*, 332 NLRB 57, 60 fn. 6 (2000), and *Kaumograph Corp.*, 316 NLRB 793, 794 (1995).

Furthermore, The Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where, as here, the witness is the Respondent's agent. See *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Therefore, as Respondent did not call Wurdack to rebut the testimony of Leeper regarding these statements, I credited Leeper's testimony and have found that, had Wurdack been called to testify, his testimony would have been adverse to Respondent's position.

I have also found that Respondent bore animus toward Leeper's other protected concerted activity. Leeper was told by Golliday and Healy that he should not be discussing wages with his coworkers. Golliday and Healy also threatened Leeper with discharge and unspecified reprisals for discussing wages with his coworkers. Furthermore, Healy gave low ratings to Mandernach and Love in their performance reviews shortly after they spoke to Leeper about Sidiqi's wages.

Finally, in statements to Stien-della Croce on the day of Leeper's discharge, Healy exhibited animus toward Leeper's union activity. Healy told Stien-della Croce that whatever Pat does is up to him, but then mentioned that "if" Leeper wanted to advance he needed to do things. Healy's comment seemed to imply that Leeper needed to choose between his union activity and advancement. Healy also said that Leeper had been involved in with "union stuff" twice and was still employed there. The timing of Healy's interaction with Stien-della Croce, just hours before Leeper's discharge, provides powerful evidence that the true motive for the discharge was unlawful. See *Toll Mfg. Co.,* 341 NLRB 832, 833 (2004) (The abruptness of a discharge and its timing are persuasive evidence that the company had moved swiftly to eradicate the prime mover of the union drive). I simply do not find it plausible that Respondent decided to discharge Leeper on May 4 for missing the all-store meeting, particularly in light of the incredible testimony of Healy and Brownlee regarding the timing of the decision and in light of Leeper's discharge occurring only hours after Stein-della Croce and her delegation left the store. Instead, I find that the visit by Stien-della Croce's visit was the proverbial "straw that broke the camel's back" and a motivating factor in Leeper's discharge.

Once the General Counsel has met his initial burden under *Wright Line,* the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316 NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996). What is required is a showing that the employer has consistently and non-discriminatorily applied its disciplinary rules. *Septix Waste, Inc.,* 346 NLRB 494, 496 fn. 15 (2006). It cannot be said, with any degree of reliability, that Leeper would have been discharged absent his union and other protected, concerted activity. Thus, I do not find that Respondent has made the necessary showing.

Respondent has shown that some employees, with less than 90 days of service to Respondent, have been terminated for missing all-store meetings. However, Respondent's own records reveal that other employees were not discharged for missing all-store meetings. For example, Caleb Dalton, an employee with a poor work record, was not discharged for missing an all-store meeting. Additionally, employee Gabriela Hernandez only had a conversation recorded in her development journal as a result of missing an all-store meeting. As such, Respondent has failed to demonstrate that it has consistently and non-discriminatorily applied its disciplinary rules.

Additionally, as a result of Respondent's noncompliance with the subpoenas issued by the General Counsel and Charging Party, I have drawn an adverse inference that had Respondent conducted a diligent search, it would have uncovered records showing that other employees of Respondent had missed all-store meetings and were not terminated. I further drew an adverse inference that had Respondent diligently searched its records it would have found and produced records which would not have supported its case, but would have instead supported the cases of the General Counsel and Charging Party.

The General Counsel made a prima facie case of discrimination under *Wright Line* by demonstrating that Leeper engaged in union and other protected, concerted activity and that Respondent had knowledge of these activities. The General Counsel further established strong evidence of animus towards Leeper's union and other protected concerted activities. The burden then shifted to Respondent to persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. Respondent has failed to meet this burden. Therefore, I find that Respondent's discharge of Leeper violated Section 8(a)(3) and (1) of the Act, as alleged.

F. *Respondent's Arguments*

In its brief, Respondent argues that Leeper's discharge did not violate Section 8(a)(3) of the Act because the Union is not a labor organization under the Act. I have already found that Union is a statutory labor organization. However, if the Board or courts should disagree with my finding on this point, I would reach the same conclusion that Leeper's discharge violated the Act. I note that even if the Union is not a labor organization, I have found that Leeper's protected concerted activity in discussing wages with his coworkers was a motivating factor in his discharge. The Board uses the analysis set forth in *Wright Line* in analyzing mixed motive discharges under both Section 8(a)(3) and (1). Therefore, even if it is eventually determined that the Union is not a labor organization under the Act, I find that Leeper's discharge independently violated Section 8(a)(1). The remedy for an unlawful discharge is the same under Section 8(a)(3) and (1). As such, my remedy and recommended Order would remain unchanged.

Furthermore, Respondent's reliance on *Society to Advance,* 324 NLRB 314, 315 (1997), in support of its argument that after discrediting Respondent's reasons for discharging Leeper, a judge may not find that the real reason is antiunion animus, is misplaced. Initially, I note that I have discredited Respondent's proffered reasons for terminating Leeper and I have found ample evidence of animus toward Leeper's union and other protected, concerted activity. In addition, *Society to Advance* is distinguishable from the instant case. The Board in *Society to Advance* stated, " having discredited the Respondent's explanations for its actions, the judge is entitled to

infer there is another reason, we note that 'it does not necessarily follow that the real reason was grounded in antiunion animus.'" 324 NLRB at 315, *quoting Precision Industries*, 320 NLRB 661 (1996). The Board in that case went on to state, "In the circumstances of this case, where there is no other evidence of animus or unlawful conduct, and no direct evidence that the Respondent knew of union activity . . . we are not willing to infer an antiunion motivation based on [a] single, post-discharge statement of opposition to unionization." 324 NLRB at 315. However, in the instant case, I have found numerous pre-discharge statements by Healy and Wurdack demonstrating animus toward Leeper's union and other protected, concerted activity. For example, Wurdack told Leeper that he let the store down, let Chipotle down, and let his coworkers down when he engaged in a strike in May 2013. I have further found that Healy told Leeper not to bring this [union] stuff to Chipotle. Following the August 2013 protest, Healy asked Leeper why he had to make things so awkward. Healy further stated that because of Leeper's protesting, he was getting flack from Wurdack and corporate. Closer to Leeper's discharge, Healy and Golliday both threatened Leeper for discussing a coworker's higher wages with other employees. Therefore, I find Respondent's reliance on *Society to Advance* misplaced.

Furthermore, I am unpersuaded by Respondent's citation to *Merillat Industries,* 307 NLRB 1301 (1992), in support of its argument that even if the General Counsel establishes a prima facie case of discrimination, the Board has found that a respondent has successfully rebutted the prima facie case in "similar cases involving a violation of company policy." (R. Br. at p. 26.) Initially, I note that in *Merillat Industries* the violation involved stealing company property and attempting to conceal the theft. 307 NLRB at 1302–1303. Furthermore, in *Merillat Industries,* the respondent produced evidence of similar treatment of other employees for very similar offenses. However, I have found here that Respondent has failed to produce evidence of similar treatment of other employees. Instead, I have found that Respondent has produced evidence of employees with less than 90 days' tenure with Respondent being discharged for missing an all-store meeting. On the other hand, evidence produced by Respondent regarding longer term employees Dalton and Hernandez showed that they were not discharged for missing all-store meetings. Furthermore, I have drawn an adverse inference against Respondent that had it conducted a diligent search, it would have uncovered records showing that other employees of Respondent had missed all-store meetings and were not terminated. Therefore, I find *Merillat Industries* inapposite to the case at bar.

Respondent further asserted several affirmative defenses, including an untimeliness defense under Section 10(b) of the Act, in its answer to the complaint. I have rejected most of Respondent's affirmative defenses by my findings and conclusions above. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132, slip op at 14 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its other affirmative defenses, including its 10(b) defense, at the hearing and the affirmative defenses were not raised in Respondent's brief, I will not address them further.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it interrogated its employees, told employees they could not talk about their wages, threatened employees with unspecified reprisals if they talked about their wages or other terms and conditions of employment, threatened employees with discharge if they talked about their wages, and told employees they could not talk about their wages, told employees that managers were instructed to report employee discussions about wages, told an employee to refrain from talking to union representatives, told an employee to refrain from engaging in protected concerted activity, and impliedly promising an employee increased wages in order to discourage the employee from engaging in protected concerted activities.

4. Respondent violated Section 8(a)(3) and 8(a)(1) of the Act when it discharged Patrick Leeper.

5. By engaging in the unlawful conduct set forth in paragraphs 3, and 4 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As part of the remedy in this case, the General Counsel has requested that I order a responsible management official of Respondent read the notice to assembled employees or have a Board agent read the notice in the presence of a responsible management official. The Board has broad discretion to fashion a remedy to fully dissipate the coercive effect of unfair labor practices. *Casino San Pablo,* 361 NLRB No. 148, slip op. at 6–7 (2014). The Board may order extraordinary remedies when a respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Federated Logistics & Operations,* 340 NLRB 255, 257 (2003), quoting *J.P. Stevens & Co.,* 417 F.2d 533, 539–540 (5th Cir. 1969.) Although I have found numerous violations of the Act, I have found that they are more limited in their nature and scope than those in the cases cited by the General Counsel in support of his argument for a notice reading. Therefore, I shall not require a notice reading as part of the remedy for this case.

The Respondent, having discriminatorily discharged employee Patrick Leeper, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall

be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Chipotle Services, LLC, a wholly owned subsidiary of Chipotle Mexican Grill, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Threatening employees with discharge for engaging in protected concerted activity.

(c) Interrogating employees about their protected concerted activity.

(d) Threatening employees with unspecified reprisals for engaging in protected concerted activities.

(e) Telling employees they cannot talk about their wages.

(f) Telling employees to refrain from talking to a Union representative.

(g) Telling employees to refrain from engaging in protected concerted activities.

(h) Impliedly promising employees increased wages in order to discourage employees from engaging in protected, concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Patrick Leeper full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Leeper whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Patrick Leeper, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(e) Compensate Patrick Leeper for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 2, 2015

_____

Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or other protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT threaten to discharge you or threaten you with unspecified reprisals for discussing wages or other terms and conditions of employment with other employees.

WE WILL NOT interrogate you about which employees have been discussing wages.

WE WILL NOT tell you that you cannot talk about wages.

WE WILL NOT tell you to refrain from talking to union representatives.

WE WILL NOT tell you to refrain from engaging in union or other protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT impliedly promise you wage increases to discourage you from supporting a union or engaging in other protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Patrick Leeper full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to him seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Leeper whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Patrick Leeper for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Patrick Leeper, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHIPOTLE SERVICES, LLC, A WHOLLY OWNED SUBSIDIARY OF CHIPOTLE MEXICAN GRILL, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-128253 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.